

070
No. 2783

United States
Circuit Court of Appeals
For the Ninth Circuit.

LOUISA PICKENS and JOHANNA SCHUTT,
Appellants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
Southern District of California, Southern Division.

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2 Briefs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

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and

J. H. MERRIAM, Esq., Union Savings Bank
Bldg., Pasadena, California. [2*]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Citation [on Appeal].

The United States of America to J. H. Merriam,
Eugene Wellke, Alma J. Schmidt, Amanda
Katzung, Minnie S. Farnsworth, Corrine Love-
land and Don Ferguson, Defendants, and to J.
H. Merriam and Hunsaker & Britt their Attor-
neys; Greetings:

*Page-number appearing at foot of page of original certified Record.

You are hereby notified that in the above-entitled case in equity an appeal has been allowed the complainants therein to the United States Circuit Court of Appeals, and you are hereby cited and admonished to be and appear in said court at 30 days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable BENJAMIN F. BLEDSOE, Judge of the United States District Court for the Southern District of California this the 5th day of February, A. D. 1916.

BLEDSOE,

United States District Judge. [3]

[Endorsed]: Copy. No. B-15. In the United States District Court, in and for the Southern District of California, Southern Division. Louisa Pickens et al., Complainants, vs. J. H. Merriam et al., Defendants. Citation. Filed Feb. 14, 1916. Wm. M. Van Dyke Clerk. By Chas. N. Williams, Deputy Clerk.

Received copy of the within citation this 14th day of February, 1916. J. H. Merriam and Hunsaker & Britt, Attorneys for Defendants for Whom we have appeared.

State of California,

County of Los Angeles,—ss.

J. P. Cottrell, Jr., being first duly sworn, deposes and says: That he is and was at all times herein mentioned, a clerk in the office of Davis, Kemp & Post, attorneys for complainants and appellants in the fore-

going and above-entitled action; that on the 14th day of February, 1916, affiant personally delivered a copy of the within citation at the office of Hunsaker & Britt attorneys for defendants, No. 1132 Title Insurance & Trust Building, which is also a copy of the original citation on file in said action.

J. P. COTTRELL, Jr.,

Subscribed and sworn to before me this 14th day of February 1916.

[Seal]

R. R. VEAL.

Notary Public in and for the County of Los Angeles,
State of California. [4]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. B-15—EQUITY.

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants. [5]

*In the District Court of the United States for the
Southern District of California, Sitting in the
Southern Division.*

No. B-15—EQ.

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Bill of Complaint.

The above-named complainants say:

I.

That the complainant Louisa Pickens is now and has been for many years a citizen and resident of the State of Kansas, living in the city of Topeka, in that State, and that the complainant Johanna Schutt is now and has been for many years a citizen and resident of the State of Nebraska living in the city of Omaha in that State; that the defendants and each of them are citizens and residents of the State of California, and of the Southern District and Division thereof, and the real estate hereinafter described is situated in said State, district and division.

[6]

II.

That the amount in controversy herein exceeds

the sum or value of Three Thousand Dollars (\$3,000), exclusive of interest and costs.

III.

That the complainants are surviving sisters and heirs at law of one Ferdinand Fensky, who died intestate at San Pedro, Los Angeles County, California, on August 7, 1903, and bring this suit to recover their distributive shares of the estate of their deceased brother; that the said Ferdinand Fensky never had any children; that he left other heirs at law, besides the complainants herein, as follows: Jeanette Fensky, his widow (since deceased), Frederick Fensky, a brother, Ida Wendt, a sister (since deceased), Hulda Richter, a sister, Augusta Krauss, a sister, Charles Fensky, a brother and George Fensky, a son of a brother who died during the lifetime of said intestate; that the said Ida Wendt died intestate subsequent to the death of Ferdinand Fensky, leaving a son, Conrad Wendt, as her sole heir at law; that after the death of the said Ferdinand Fensky and of the said Ida Wendt, and some years prior to the beginning of this suit, the said Conrad Wendt died unmarried, intestate and without issue or direct heirs, and each of the complainants as maternal aunt of the said Conrad Wendt succeed to one-seventh ($1/7$) of the interest of the said Ida Wendt in the estate of the said Ferdinand Fensky, and the property hereinafter described.

IV.

That at the time of his death Ferdinand Fensky was the owner of a large amount of real estate, all of which your orators for want of information are

not able to describe, but, so far as [7] known to your orators, is described as follows:

(A) A piece or parcel of land situated in the city of Los Angeles, California, being as follows: Commencing at a point on the West line of New High Street distant 200 feet Southwest from the Southwest corner of Alpine Street and New High Street; thence Southwesterly along the West line of New High Street 73 feet to a point; thence Westerly at right angles to said West line of New High Street 65 feet to a point; thence Northeasterly at right angles to the last-mentioned course parallel with and distant from the West line of New High Street 73 feet to a point; thence 65 feet Easterly to the West line of New High Street to the point of beginning; being parts of Lots 10 and 11 in Block 33, of Ord's Survey, as recorded in Book 55, Page 66, Miscellaneous Records of Los Angeles County, California.

(B) Lots 19 to 29 inclusive in Block 3, Peck's Subdivision of the Carolina Tract in the city of San Pedro, Los Angeles County, California.

(C) Lots 9 and 10 of Peck's Subdivision of Lot 74 in said city of San Pedro, Los Angeles County, California.

(D) The West half of the Southwest quarter of the Northwest quarter of Section 24, Township 5 W., Range 10 S., in Orange County, California.

(E) The Southwest quarter of the Southeast quarter and the South half of the Northwest quarter of the Southwest quarter of Section 4, Township 5 W., Range 10 S., Orange County, California. [8]

V.

That at the time of his death Ferdinand Fensky owned and possessed promissory notes executed by various persons aggregating about \$20,000 in face value and payable to him at various times, as stated in said notes.

A schedule of said notes is hereto attached, marked exhibit "A," and made a part hereof.

On information and belief the complainants aver that the said Ferdinand Fensky owned other promissory notes payable to him and executed by various persons, but for want of information are unable to give a description of the same.

VI.

That at the time of his death various persons were indebted to the intestate on account of the purchase money on real estate sold by him to such persons; that at the times said real estate was sold the intestate executed to said purchasers contracts for deeds whereby he agreed to convey the real estate described therein upon the full payment of the purchase price, and at his death there was unpaid a large amount of such purchase price.

A schedule, showing such indebtedness, so far as known to complainants, is attached hereto, marked exhibit "B" and made a part hereof; that on information and belief complainants aver that other persons were indebted to the said Ferdinand Fensky at the time of his death on account of similar transactions, but for want of sufficient information complainants are unable to give the details of such transactions.

VII.

That complainants are informed and believe that at the time of his death Ferdinand Fensky possessed cash in bank and in the hands of agents and attorneys, amounting to about \$10,000. [9]

III.

That said real estate situated in the city of Los Angeles, California, at the time of intestate's death, was reasonably worth \$2,500; that said real estate owned in San Pedro was then worth about \$14,000; that said real estate in Orange County was then worth about \$10,000; and that the whole of the property and estate owned and possessed by intestate, so far as complainants can ascertain the same, was then worth \$100,000.

IX.

That on October 15, 1903, by the consideration of the Superior Court of Los Angeles County, California, the said Jeanette Fensky was appointed and became administratrix of the estate of her deceased husband; that upon the death of Ferdinand Fensky, the said Jeanette Fensky came into the possession of a large sum of money in cash belonging to her deceased husband, the exact amount of which is to the complainants unknown, but which on information and belief they aver to have been in excess of \$5,000; that she also came into possession of the promissory notes described in Schedule A, attached hereto, and also of other promissory notes, which, for want of information, complainants are unable to describe; and also came into possession of all of the

evidences of indebtedness due to the said Ferdinand Fensky, but which the complaints are unable, for want of sufficient information, more fully to describe; that as such administratrix the said Jeanette Fensky came into possession of the real estate hereinbefore described, in the State of California; that well knowing the value thereof to be as hereinbefore alleged, and designing to deceive and defraud the complainants, and other heirs at law of her deceased husband, she caused the said California real estate to be falsely and fraudulently appraised and inventoried [10] at a total sum of about \$6,000; that instead of returning to said Superior Court a true inventory of said personal property she inventoried but one promissory note for the sum of \$400, and, pursuing said design to mislead and defraud the complainants and other heirs of her deceased husband, purposely failed to list and inventory the said cash belonging to said intestate which came into her possession; also purposely failed to inventory the evidences of indebtedness due to her deceased husband from said purchasers of real estate; and also purposely omitted from said inventory a large amount of other real and personal property, which the complainants for want of information are unable to describe; that said inventory was duly signed by the said Jeanette Fensky as such administratrix and was by her presented to said Superior Court as and for a true inventory of the estate of her deceased husband, when in truth and in fact the same was false and fraudulent as aforesaid, and intended by the said Jeanette Fensky to

deceive the complainants as sisters of her deceased husband into the belief that his estate consisted of nothing but the property therein described and valued, and thereby induce them to relinquish their just claims to their respective shares thereof.

X.

That after the death of Ferdinand Fensky the said Jeanette Fensky, pursuing said design, sent all of said promissory notes and all of the evidences of indebtedness due to her deceased husband, to her agent and representative in the State of Kansas, one M. T. Campbell, who then and now resided and resides at Topeka, in Shawnee County, in that State; and entered into a fraudulent and collusive agreement with him that the said Campbell [11] should act as her agent and representative in obtaining releases from complainants, and pursuant to such agreement, and for the purpose of carrying it out, procured the said Campbell, by virtue of certain proceedings in the Probate Court of Shawnee County, Kansas, a court of record having jurisdiction of the estates of deceased persons, to be and he was on September 9, 1903, appointed as a so-called administrator of the estate of the said Ferdinand Fensky; that on or about October 22, 1903, the said Campbell filed in said Probate Court a pretended inventory represented by him to be "a true inventory of all the goods, chattels, rights and credits of Ferdinand Fensky, deceased, which are by law to be administered in Kansas, and also an inventory of the real estate of Ferdinand Fensky," and showing personal property amounting to \$20,927.64, con-

sisting of \$4,297.14 cash in hand, and a part of the promissory notes described in Schedule A hereof, but wholly failed to list the note signed by W. C. Stein, and the note signed by Simms; that said Campbell purposely omitted from said inventory any reference to the indebtedness due said intestate from said purchasers; that the real estate sold by intestate and for which said purchasers were indebted to him, and, after his death, to his estate, is situated in and near said city of Topeka, and consisted in part of what is known as Fensky's First and Second Additions, about twelve acres in Kaw Reserve No. 5, Lot 61 on Kansas Avenue South, and part of Lot 71 on Kansas Avenue North; that the Kansas law regulating the descent and distribution of property, then as now, provided and provides that real estate of an intestate husband dying without children, descends directly to his widow, and no part of the same descends to his next of kin; that well knowing the provisions of said law and the foregoing facts, and pursuant to said [12] fraudulent design and agreement, the said Jeanette Fensky and the said Campbell listed in said inventory, filed in said Probate Court, the real estate sold by intestate to said purchasers as real estate, and, knowing that none of the contents of sale of said real estate had been recorded, and knowing that complainants had no knowledge that said real estate had been sold, concealed the fact that such real estate had been sold, and by listing the same as real estate falsely represented to complainants that the real estate so sold belonged to said widow under said law and that

complainants had no interest therein; that it was the duty of said widow and of said Campbell under the laws of both California and Kansas, to inventory and account for the indebtedness due from said purchasers as personal assets of said intestate distributable according to the law of California applicable to separate property of a deceased husband dying in that State, without issue, and leaving a widow and brothers and sisters; that for the purpose of carrying out said fraudulent design of securing from complainants by misrepresentation and fraud, a release of their lawful claims against the estate of their deceased brother, the said Jeanette Fensky and the said Campbell concealed the existence of the indebtedness due said estate from said purchasers omitted from both said inventories said indebtedness and stated therein, and otherwise, that said real estate was actually Kansas real estate owned by intestate and as such descended to and belonged solely to said Jeanette Fensky.

XI.

That under the laws of the State of Kansas, then and now in effect, where the vendee in a contract of sale of real estate dies without having executed a deed to the purchaser, upon the [13] payment to the administrator of his estate of the unpaid balance of the purchase money the administrator is authorized, and may be directed by the Probate Court, to execute such deed with the same effect as though it had been executed by the vendor; that some time prior to his death the said Ferdinand Fensky and the said Jeanette Fensky drew up and signed deeds

of conveyance to the several purchasers holding said contracts but did not deliver the same; that all of said undelivered deeds came into the hands of Jeanette Fensky upon the death of her husband; that well knowing that the execution by her or by the said Campbell as administrator of deeds to said purchasers would reveal the fact that said real estate had been sold and that the purchase money constituted personal property of said estate, the said widow and the said Campbell soon after their respective appointments began negotiations with the said purchasers to accept said undelivered deeds notwithstanding the death of said Ferdinand Fensky, and to execute to the said Jeanette Fensky mortgages for the amount of the unpaid purchase money due under said contracts of sale; that substantially all of the purchasers mentioned in Schedule B hereof, accepted said proposition, and, said deeds all of which were dated prior to the death of the said Ferdinand Fensky, were by the said Jeanette Fensky, through the said Campbell, delivered to said purchasers and they executed to the said Jeanette Fensky mortgages for such unpaid balance of the purchase money; that said Jeanette Fensky and the said Campbell, still pursuing the aforesaid fraudulent design, omitted from their inventories in Kansas any reference to said mortgages, and neither the said Jeanette Fensky in her lifetime; nor the said Campbell, nor anyone else, representing the estate of the said Fensky, has accounted to the complainants for any part or share of said mortgages, [14] or the proceeds therefrom,

and the same are as hereinafter related unadministered assets of the estate of the said Ferdinand Fensky, deceased, in which these complainants have an interest as his heirs at law.

XII.

That by means of said inventories filed by said Jeanette Fensky and said Campbell, and otherwise, they represented that the estate of the said Ferdinand Fensky consisted of property situated in California of the value of about \$6,000 and of property in the hands of the said Campbell, amounting to about \$20,000, and represented that of this estate the widow Jeanette Fensky was entitled to one-half and that the remaining half was subject to distribution among the other heirs at law of said intestate, so that, according to the inventories prepared by them, the widow would receive about \$10,000 from the property in the hands of the said Campbell, and about \$3,000 of property in her hands in California, and in addition thereto, that said widow was entitled to the real estate described in Campbell's inventory, situated in the State of Kansas; that in truth and in fact as said Jeanette Fensky and said Campbell well knew, the California real estate owned by said intestate at the time of his death was worth nearly \$30,000 and the personal property in California in the hands of the said Jeanette Fensky was of the value of more than \$50,000, and in truth and in fact the personal property including that which the said Jeanette Fensky turned over to the said Campbell, for such pretended administration, in the State of Kansas, was of the

actual value of nearly \$60,000; that almost immediately after the death of the said Ferdinand Fensky the said Campbell began the collection of moneys due on account of the promissory notes set out in Schedule A, and also moneys due from said purchasers; [15] and prior to July, 1904, the said Campbell had collected of assets belonging to the estate of the said intestate, either in cash or in available mortgage notes, well secured, more than \$15,000; that from time to time the said Campbell, without the knowledge or consent of the complainants, remitted to said Jeanette Fensky large sums of money and retained other large sums of money in his hands for the purpose of carrying out the aforesaid design of securing for the said Jeanette Fensky the shares of the estate of their deceased brother, to which these complainants were justly entitled, that within a short time after the appointment of the said Campbell as such administrator, he represented to the complainants that it would take a long time to close up the estate of the said Ferdinand Fensky; that many of the promissory notes inventoried by him were of little or doubtful value; that the makers of said notes were accustomed to taking time for the payment of the same; that the costs of administration would amount to a considerable sum and that even if he should be able to collect said notes, that the shares of said estate to which each of the complainants ultimately might be entitled would not exceed the sum of \$1,000; that the said Campbell further represented that the real estate in and near Topeka, Kansas, all went to the widow; that the property left

by intestate was community property, to which the said Jeanette Fensky was entitled to one-half absolutely; and that if they wanted their shares, the said Jeanette Fensky would buy from the complainants their claims against said estate for \$1,000 each; that each and all of said representations were false, fraudulent and misleading, and were by the said Campbell and the said Jeanette Fensky, known to be false, fraudulent and misleading; that the said promissory notes were all good; that said intestate left no debts and there was no just reason why the estate should not be closed and final distribution made [16] within a reasonable time; that the amount which each of the complainants was entitled to receive from said estate, upon a full disclosure and accounting, was more than \$8,000; that the said property left by said intestate was not community property, but was his separate property; that the costs of administration ought to have been comparatively small, and not exceeding the amount authorized by law; that the value of the estate was nearly \$100,000, instead of about \$26,000, as represented by said Campbell and said widow; that at the time the aforesaid representations were made these complainants had no knowledge of the actual facts as herein stated, but relied upon said inventories and the said representations made to them, and, believing the same, the complainant Louisa Pickens, on or about July 29, 1904, accepted the sum of \$1,000 then paid to her by the said Campbell, and executed, and delivered to him for the said Jeanette Fensky, all of the right, title and interest of the said Louisa

Pickens, in and to the property and estate of her said deceased brother; and on or about August 3, 1904, the complainant Johanna Schutt, relying upon and believing the said inventories and the said representations made to her, accepted *to* sum of \$1,000 then paid to her by the said Campbell, and executed and delivered to him for the said Jeanette Fensky, a similar release and quitclaim releasing and conveying unto the said Jeanette Fensky all of the right, title and interest of the complainant Johanna Schutt in and to the property, assets and estate of her said deceased brother; that the \$1,000 so paid to each of the complainants as their full share of said estate, and for which they executed said releases and quitclaim deeds, is all that either of the complainants ever received from the estate of their deceased brother; that said sums were so paid to the said complainants by the said Campbell [17] out of funds in his hands collected from the assets of the said estate; that the said Jeanette Fensky did not advance or pay anything whatever for said releases and quitclaims; that the \$1,000 each received by said complainants was only a part of the money then due to them respectively from said estate and the said Jeanette Fensky parted with nothing of value for said releases and quitclaims; that said instruments, and each of them, are ineffective and without consideration and are wholly fraudulent and void, for that, the same were secured from these complainants, and each of them, upon the faith of the aforesaid false, fraudulent and misleading-misrepresentations, statements and representations,

made by the said Jeanette Fensky and the said Campbell; that if the complainants had known or had any suspicion of the truth, neither of them would have executed said release and quitclaim, but would have insisted upon receiving their full share of said estate.

XIII.

That prior to March 30, 1905, the said Campbell, remitted to the said Jeanette Fensky about \$35,000 in cash and secured notes, being proceeds of the assets of the estate of the said intestate which came into his hands; that on or about March 30, 1905, the said Jeanette Fensky filed in the Superior Court of Los Angeles County, California, a pretended final account, in which she represented that she had secured the interest of all the brothers and sisters and other heirs at law of her deceased husband, and that she was the only one entitled to said estate; that there being no debts due from the said intestate, and no opposition to said pretended final account, the same was received and approved by said Superior Court and an order entered discharging the said Jeanette Fensky as such administratrix, and [18] closing said estate; that said Jeanette Fensky thereupon caused said deeds of release and quitclaim to be filed of record in Los Angeles County, and in Orange County, California, and upon the faith of the same secured purchasers of the property in Orange County, California, and also of some of the property in San Pedro, California, realizing therefrom more than \$26,000; that with the money and mortgages received from the said Campbell in the

circumstances aforesaid, and the money derived from the sale of said California real estate, the said Jeanette Fensky purchased real estate in Los Angeles County, California, and at the time of her death in 1909 was the owner of the following described real estate, to wit:

Item 1.

The North 66 feet of the East 200 feet of Lot 80, L. H. Michner's Subdivision of the North 38 acres in Block U of Painter & Ball's Addition to Pasadena, California;

Item 2.

Lot 6 in Block A New Fair Oaks Avenue Tract, Pasadena, California.

Item 3.

Lot 12 of A. F. Mill's Subdivision of the North half of Lot 6 of the Berry & Elliott Tract, Pasadena, California.

Item 4.

That portion of Lot "O" of the San Pasqual Tract in Pasadena, California, described as follows: Beginning at a point in the East line of Lot Four, distant one hundred thirty-two feet South from the Northeast corner thereof; thence West parallel with the North line of said lot two hundred feet to the [19] East line of Magnolia Avenue one hundred feet; thence East parallel with the North line of said lot two hundred feet to the East line thereof; thence along the last-mentioned line one hundred feet to the place of beginning.

Item 5.

Lot 2 of the F. E. Crawford Tract in Pasadena, California.

Item 6.

Lot 16 of S. H. Doolittle's Subdivision of Lot 21 of B. F. Ball's Subdivision of Pasadena, California.

Item 7.

Lot 10 Peck's Subdivision of Block 74 in San Pedro, California.

Item 8.

A piece of property on New High Street, in the city of Los Angeles, County of Los Angeles, State of California, described as follows: Commencing at a point on the West line of New High Street, distant 200 feet Southwest from the Southwest corner of Alpine Street and New High Street; thence Southwesterly along the West line of New High Street 73 feet to a point; thence Westerly and at right angles to said West line of said New High Street 64 feet to a point; thence Northeasterly and at right angles to said last-mentioned course and distant and parallel with the West line of New High Street 73 feet to a point; and, thence Easterly by a straight line 65 feet to the West line of New High Street to point of beginning or commencement, being parts of lots 10 and 11, in Block 33 of Ord's Survey, according to the map in Book 53, Page 68, Miscellaneous Records of Los Angeles County, California. [20]

Item 9.

The portion of Lot 21 of A. F. Mill's Subdivision of the North half of Lot 6 of the Berry & Elliott Tract in Pasadena, California, beginning at the Northwest corner of said lot; thence East along the South side of Colorado Street 25 feet; thence South one hundred thirty-two and seventy-five hundredths

feet to an alley; thence West 25 feet; thence North one hundred and thirty-two and seventy-five hundredths feet to the place of beginning, except a strip twelve and seventy-five hundredths feet wide off the North side, now a part of Colorado Street.

Item 10.

The South fifty feet of the North one hundred feet of Lot Eight, and the South fifty feet of the North one hundred feet of the West ten feet of Lot Seven of L. A. Michner's Subdivision of Lots Fourteen to Seventeen both inclusive of the Summit Avenue Tract, in Pasadena, California.

Item 11.

Lot 24 of Mary H. Newton Tract in Pasadena, California.

Item 12.

Lot 7 in Block A of G. Weingarth's Subdivision B of the San Gabriel Orange Association lands in Pasadena, California.

That prior to her husband's death the said Jeanette Fensky had no money or property, whatever, and all the property, including the said Pasadena real estate, owned by her at the time of her death, was acquired by the use of money and assets belonging to her husband's estate, and which came into her hands in the circumstances hereinbefore alleged.

[21]

XIV.

That the said Jeanette Fensky died on July 8, 1908; that prior to her death and on or about September 18, 1907, the said Jeanette Fensky, without any consideration therefor, executed and delivered a

deed purporting to convey the property hereinbefore described, situated on New High Street in the city of Los Angeles, California, to the defendant Amanda Katzung; and on the same day, without consideration, executed a deed purporting to convey to said Amanda Katzung said Lot 10 in Peck's Subdivision of San Pedro, California; that at or about the same time, without consideration, the said Jeanette Fensky executed a deed purporting to convey to the defendant Eugene Wellke, real estate situated in the State of Kansas; that with the funds received from the said Campbell, in the circumstances hereinbefore related, and with the funds arising from the sale of said Orange County property, the said Jeanette Fensky, on or about May 28, 1907, purchased the North sixty feet of the East two hundred feet of Lot 8 in Michner's Subdivision of the Northeast 38.86 acres in Block U. T. & B. Addition to Pasadena, California, and on the same day signed a deed purporting to convey to the defendant Alma J. Schmidt, said last-mentioned property; that on or about August 1, 1908, on the petition of the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt, the defendant J. H. Merriam was appointed by the Superior Court of Los Angeles County, California, administrator of the estate of the said Jeanette Fensky; that in said petition it is alleged that the whole of the property of the said Jeanette Fensky at the time of her death consisted of about \$2,300 in money; that for some time after his appointment the said J. H. Merriam took no steps whatever looking to the administration [22] of the estate, but on Septem-

ber 8, 1909, he filed in said matter a pretended inventory from which it appears that the total assets of the estate of the said Jeanette Fensky amounted to about \$3,500, consisting of \$2,324.38 in money, a claim against the defendant Amanda Katzung and a note of the defendant Don Ferguson, amounting to \$1,050; that upon the coming in of said inventory and on September 8, 1909, the defendant J. H. Merriam filed a purported final account of said estate, and in said purported final account represented that property of the intestate in course of administration in the Probate Court of Shawnee County, Kansas, had been wholly administered and distributed; and further represented that the said Jeanette Fensky left as her sole heirs at law the defendants Eugene Wellke, Amanda Katzung, and Alma J. Schmidt;

Complainants aver that at the time the said pretended final account was filed by the said J. H. Merriam, he knew that the said Jeanette Fensky at the time of her death owned the real estate hereinabove described; and knew that the same was distributable among the heirs at law of Ferdinand Fensky, the deceased husband of the said Jeanette Fensky, and knew that neither the said Eugene Wellke, nor the said Amanda Katzung, nor the said Alma J. Schmidt had any interest whatsoever in the same; that as the said Merriam well knew, some time prior to her death the said Jeanette Fensky made out and signed deeds purporting to convey the property owned by her as follows:

A deed to Alma J. Schmidt of the real estate described herein as Item 1 of the real estate owned by

Jeanette Fensky at the time of her death;

A deed to Eugene Wellke of the real estate described in Item 2; [23]

A deed to Minnie S. Farnsworth of the real estate described in Item 3;

A deed to the defendant Eugene Wellke of the real estate described in Item 4;

A deed to the defendant Amanda Katzung of the property described in Item 5;

A deed to the defendant Alma J. Schmidt of the real estate described in Item 6;

A deed to the defendant Amanda Katzung of the real estate described in Item 7;

A deed to the defendant Amanda Katzung of the property described in Item 8;

A deed to the defendant Eugene Wellke of the real estate described in Item 9;

A deed to the defendant Corrine Loveland of the property described in Item 10;

A deed to the defendant Eugene Wellke of the property described in Item 11;

A deed to the defendant Eugene Wellke of the property described in Item 12;

That all of said deeds so made out by the said Jeanette Fensky were not delivered to the respective grantees named therein until after the death of the said Jeanette Fensky; that the title and ownership of said property did not pass to the said grantees; and, at the time of her death the said Jeanette Fensky was the owner of the same; that the said J. H. Merriam well knowing all the foregoing facts, wholly omitted said property from his inventory and ac-

counts, and pretended to make [24] distribution of the estate of the said Jeanette Fensky, and paid over to each of the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt, \$235.61, out of the assets and also turned over to them certain notes belonging to the said Jeanette Fensky, and certain property, which these complainants are unable more particularly to describe; On information and belief complainants aver that the said J. H. Merriam while pretending to act as administrator of the estate of the said Jeanette Fensky, was employed by and acted as attorney and agent for, the defendants Eugene Wellke, Amanda Katzung, Corrine Loveland, Minnie S. Farnsworth, and Alma J. Schmidt, with full knowledge of the rights of the complainants herein, and with the purpose and design of preventing them from securing their just share of said estate of their deceased brother; that the said J. H. Merriam, although requested so to do, has made no effort to represent said estate, and have the administration thereof continued by said Superior Court of Los Angeles County, California, and has failed, refused and neglected to further administer the same, and pretends to deny the rights of these complainants in respect thereof.

XV.

That all of the estate of the said Ferdinand Fensky was his separate property, and as such upon the death of his widow, the said estate and its avails, descended ratably to the surviving brothers and sisters of the said Ferdinand Fensky, and not to the sisters and brother of said Jeanette Fensky; that these com-

plainants have not received from the estate of their deceased brother anything, except the said \$1,000 each, paid to them by the said M. T. Campbell in the circumstances hereinbefore related; that the defendant Minnie S. Farnsworth is a daughter of [25] the said defendant Eugene Wellke, and claims to be the owner of the property described in Item 3 by virtue of said undelivered deed; that the defendant Don A. Ferguson, by virtue of a deed executed to him by Jeanette Fensky, claims to be the owner of the real estate described in Item 3 hereof; that Corrine Loveland claims an interest in the real estate described in Item 10 hereof, by virtue of an undelivered deed as hereinbefore alleged; that whatever right, title or interest the defendants or either of them have or claim to have in any of said property of the said Jeanette Fensky, is subject to the claims of these complainants as heirs at law of the said Ferdinand Fensky, and of the said Jeanette Fensky, both deceased.

XVI.

Complainants aver that until late in the summer of 1912, they did not, nor did either of them, have any notice, knowledge or suspicion of the truth respecting the amount, extent and value of the estate of their deceased brother, nor of the frauds and fraudulent conduct of the said M. T. Campbell, the said Jeanette Fensky, and the said J. H. Merriam, nor did either of them have any notice, knowledge or suspicion of the truth respecting the undelivered deeds made by the said Jeanette Fensky in her life time, to the defendants herein, as heretofore stated;

that during the month of July, 1912, one of the daughters of the complainant Louisa Pickens, while visiting in Los Angeles, California, accidentally secured access to the correspondence between the said M. T. Campbell and the said Jeanette Fensky, which disclosed to said daughter a part of the truth relative to the estate of Ferdinand Fensky, and the dealings of the said Campbell and the said Jeanette Fensky in reference thereto; that the undelivered [26] deeds signed by the said Jeanette Fensky were recorded a few days after her death, but were made and acknowledged several months before she died; that until in the early part of 1913, neither of the complainants had any notice or knowledge that said deeds were not delivered during the life time of Jeanette Fensky, although the complainants had knowledge of the contents of the inventories filed by the said Campbell, the said Jeanette Fensky and the said Merriam; that these complainants, through their children and otherwise, during the pendency of the proceedings in said Probate Court of Shawnee County, Kansas, and during the pendency of the proceedings in the Superior Court of Los Angeles County, California, involving the administration of the estate of the said Ferdinand Fensky and of the said Jeanette Fensky, paid attention to said proceedings, and from time to time secured copies of papers that were filed therein; that none of said papers and none of the records disclosed the truth as your complainants now aver it to be, and their present knowledge concerning the extent and value of the estate of their deceased brother, and

of the facts relating to the estate of the said Jeanette Fensky has been secured since the discovery of the correspondence between the said Campbell and the said Jeanette Fensky, which aroused the suspicion of complainants and caused them to and they have used extraordinary efforts to learn the facts. And complainants aver that they believed the statements contained in the said inventories and believed the representations made to them by the said Jeanette Fensky, and by the said Campbell and by the said Merriam; and aver that except for such representations they would not have released the estate of said Ferdinand Fensky from their just claims, but would have enforced the same. [27]

The premises considered, the complainants pray as follows:

1.

That an account be taken of all of the property of the said Ferdinand Fensky, deceased, owned or possessed by him at the time of his death, and that it be determined and adjudged by this Court that the same was his separate estate and distributable as such under the laws of the State of California.

2.

That the pretended deeds of release and quitclaim executed by these complainants to the said Jeanette Fensky be declared fraudulent and void, and of no effect and that the same be adjudged not to estop these complainants or either of them from claiming their respective shares of the estate of the said Ferdinand Fensky.

3.

That an account be taken of the property and estate of the said Jeanette Fensky and the sources from which the same was derived, and that upon final hearing it be determined that all of the property owned by her at the time of her death is distributable among the heirs at law of the said Ferdinand Fensky, deceased; and that neither the defendant Eugene Wellke nor the defendant Amanda Katzung nor the defendant Alma J. Schmidt, have any interest whatsoever in said property or any part of the same.

4.

That it be determined by this court that the pretended deeds under which the defendants Wellke, Katzung, Schmidt, Farnsworth, Ferguson and Loveland claim, are wholly invalid and void, and that neither of said persons has any right, title or interest whatever in, to, or about the said estate, or any part of the same. [28]

5.

That the defendant J. H. Merriam be required to account to these complainants for their distributive shares of the estate of the said Jeanette Fensky, which came into his hands and which was by him distributed to the said Wellke, Katzung and Schmidt.

6.

The complainants pray that in the event it shall be ascertained by the Court, upon further proceedings herein, that other persons have or claim to have some interest in the estate of the said Ferdinand Fensky, that these complainants have leave to bring in said persons, and that any other heirs at law of the

said Ferdinand Fensky, applying therefor, may be made parties hereto, to the end that the rights of all of the persons having or claiming to have any interest in said estate, may be ascertained and determined.

7.

The complainants pray for such other, further and general relief as to the Court may seem equitable and just.

DAVIS, KEMP & POST,
D. R. HITE,

Solicitors for Complainants. [29]

Schedule A [to Bill of Complaint].

						Amount.
1.	A note signed by one	Stein				\$2,400 00
2.	" " " " "	Simms				325 00
3.	" " " " "	M. & C. Millice				1,500 00
4.	" " " " "	J. W. & E. Rigdon				30 50
5.	" " " " "	A. & J. Bauch				200 00
6.	" " " " "	J. A. & B. Lukens				100 00
7.	" " " " "	Lukens Bros. & their wives				900 00
8.	" " " " "	W. R. Mitchell & wife				2,000 00
9.	" " " " "	H. & H. & F. & E. & H. Buchannan				1,500 00
10.	" " " " "	W. C. & V. Stadel				100 00
11.	" " " " "	" " " " "				250 00
12.	" " " " "	M. & J. W. Strump				165 00
13.	" " " " "	E. & A. Wardell				1,350 00
14.	" " " " "	J. & K. Petri				400 00
15.	" " " " "	John Coster				1,500 00
16.	" " " " "	J. & L. Bauch				300 00
17.	" " " " "	J. H. Foucht				800 00
18.	" " " " "	A. J. Hutchinson				550 00
19.	" " " " "	John Sheetz				400 00
20.	" " " " "	E. D. Jones & wife				500 00
21.	" " " " "	F. A. Root & wife				500 00
22.	" " " " "	J. E. & L. Bauch				700 00
23.	" " " " "	G. & L. & G. Stokes				700 00
24.	" " " " "	P. Hamschild & wife				150 00

Schedule B [to Bill of Complaint].

Showing date of contract of sale, name of purchaser, description of property sold in Topeka, Kansas, amount of purchase price, and amount unpaid at time of Ferdinand Fensky's death.

Date.	Purchaser.	Property Sold Fensky's Addition. Lots.	Street.	Purchase Price	Amt. Unpaid.
11 15 00	M. Etzel	9, 10	Locust	704 00	514 00
11 15 01	John Sell	48, 50	Lake	715 00	598 00
11 15 01	Jos. Walker	35, 37, 39	Locust	1209 45	684 00
7 10 00	John Dietz	9, 11	Lake	500 00	243 00
8 1 01	G. A. Baxter	28, 30, 32	Lake	915 00	696 00
9 15 01	E. H. Stamm	24, 26	Lake	200 00	110 00
8 1 01	Louis Schaeffler	60, 62	Lake	915 00	969 00
8 1 01	George Hammerick	18, 20, 22	Lake	800 00	587 18
8 1 01	A Meder.	23, 25, 27	Locust	630 00	525 00
8 1 01	John Donne	12, 14	Chandler	840 00	745 00
8 1 01	George Brosamer	65, 67, 69	Locust	1500 00	1089 00
8 1 01	Reed Saylor	19, 21	Locust	900 50	860 00
8 1 01	W. L. Haven	42, 44, 46	Lake	970 00	750 00
8 1 01	C. Van Laeys	51, 53	Locust	800 00	615 00
8 1 01	George Lippert	48, 50	Chandler	660 00	300 00
8 1 01	B. S. Dustin	62, 64	Chandler		275 00
8 1 01	M. G. Tracy	47, 49, 51	Lake		510 00
8 1 01	J. H. Brosamer	64, 66, 68			
		& 70	Lake		800 00
8 1 01	Jacob Fink	41, 43, 45	Lake		209 00
8 1 01	M. S. Grant	25, 27	Lake		640 00
[31]					
8 1 01	Wesley Sagar	12, 14, 16	Lake		860 00
8 1 01	John H. Sell	48, 50	Lake		1040 00
8 1 01	George Jammer	29, 31, 33	Lake		912 00
8 1 01	Frank Gutsch	52, 54	Lake		660 00
8 1 01	Casper Gettig	9, 11	Locust		450 00
8 1 01	Sarah Rost	61	Kan. Ave.		4200 00
8 1 01	H. S. Priessuer	71	Kan. Ave.		2200 00
8 1 01	W. E. Gibbons	6, 8, 10	Lake		900 00
8 1 01	Henry Franks	1, 3	Locust		540 00
8 1 01	Frank Sawyer	1, 3	Lake		430 00

[32]

[Endorsed]: Original. No. B-15—Eq. In the District Court of the United States, for the Southern District of California, Sitting in the Southern Division. Louisa Pickens and Johanna Schutt, Complainants, vs. J. H. Merriam, et al., Defendants. Bill of Complaint. Filed Jul. 8, 1914. Wm. M. Van Dyke. Clerk. By R. S. Zimmerman, Deputy Clerk. Davis, Kemp & Post, D. R. Hite, Solicitors for Complainants. 812 Marsh-Strong Bldg., Los Angeles. [33]

[Subpoena ad respondendum.]

UNITED STATES OF AMERICA.

District Court of the United States Southern District of California, Southern Division.

IN EQUITY.

The President of the United States of America,
Greeting:

To J. H. Merriam, Eugene Wellke, Alma J. Schmidt;
Amanda Katzung; Minnie S. Farnsworth, Corrine Loveland and Don Ferguson.

YOU ARE HEREBY COMMANDED, that you be and appear in said District Court of the United States aforesaid, at the courtroom in Los Angeles on or before the twentieth day, excluding the day of service, after service of this subpoena upon you, to answer a Bill of Complaint exhibited against you in said court by Louisa Pickens and Johanna Schutt who are citizens of the State of Kansas and Nebraska respectively and to do and receive what the said Court shall have considered in that behalf. And this

you are not to omit, under the penalty of five thousand dollars.

WITNESS, The Honorable OLIN WELLBORN, Judge of the District Court of the United States, this eighth day of July in the year of our Lord one thousand nine hundred and fourteen and of our Independence the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,
Clerk.

By R. S. Zimmerman,
Deputy Clerk. [34]

Memorandum pursuant to Rule 12, of Rules of Practice for the Courts of Equity of the United States, Promulgated by the Supreme Court, November 4, 1912.

On or before the twentieth day after service of the subpoena, excluding the day thereof, the defendant is required to file his answer or other defense in the clerk's office; otherwise the Bill may be taken *pro confesso*.

WM. M. VAN DYKE,
Clerk.

By R. S. Zimmerman,
Deputy Clerk.

To the Marshal of the United States, for the Southern District of California:

Pursuant to Rule 12, the within subpoena is returnable into the clerk's office twenty days from the issuing thereof.

Subpoena issued July 8th, 1914.

WM. M. VAN DYKE,
Clerk.

By R. S. Zimmerman,
Deputy Clerk.

[Endorsed]: Marshal's Civil Docket No. 2466. No. B-15—Equity. U. S. District Court, Southern District of California, Southern Division. In Equity. Louisa Pickens et als. vs. J. H. Merriam, et al. Subpoena. Filed Jul. 17, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [35]

[Marshal's Return to Subpoena ad Respondendum.]

United States Marshal's Office,
Southern District of California.

I HEREBY CERTIFY, that I received the within Writ on the 8th day of July, 1914, and personally served the same on the —— day of ———— 19—, on Minnie S. Farnsworth 7/9, Eugene *Willke* 7/9, Alma J. Schmidt 7/10, Amanda Katzung 7/9, by delivering to and leaving with Minnie S. Farnsworth, Eugene *Willke*, Amanda Katzung, and Chas. F. Schmidt, husband of Alma J. Schmidt, *Corine* Loveland and Don Ferguson out of district. Said defendants named therein, personally, at the county of LA. in said District, a copy thereof.

C. T. WALTON,
U. S. Marshal.

By Dolph S. Bassett,
Deputy.

Los Angeles, July 17th, 1914. [36]

**[Motion of Eugene Wellke et al. to Dismiss Bill of
Complaint.]**

*In the District Court of the United States for the
Southern Division of California, Sitting in the
Southern Division.*

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM et. al.,
Defendants.

Now comes the defendants, Eugene Wellke and Minnie S. Farnsworth, Alma J. Schmidt, and on the records, pleadings and files in said cause, move the court to dismiss the plaintiffs' complaint, upon the following grounds, to wit:

1. That it appears on the face of said complaint by plaintiffs' own showing, that they are not entitled, nor is either of them entitled to the relief prayed for by the complaint against this defendant, nor to any relief arising from the facts alleged in said complaint.

2. That it appears on the face of said complaint that this court has no jurisdiction to hear and determine this suit.

3. That it appears on the face of said complaint that this court has no jurisdiction of the subject matter of this suit.

4. That it appears on the face of said complaint that said complaint of the plaintiffs is wholly without equity.

5. That it appears on the face of said complaint that there is a nonjoinder of parties defendant therein, in this [37]

That M. T. Campbell, the only surviving participant in the alleged fraudulent acts and concealments, primarily relied upon in said complaint, is not joined as a party defendant therein.

6. That it appears on the face of said complaint there is a misjoinder of causes of action set forth therein, in this:

(a) That an alleged cause of action against these movants as heirs and distributees of the estate of Jeanette Fensky, deceased, is united and mingled with an alleged cause or alleged causes of action against other persons who were not heirs nor distributees of said Jeanette Fensky, and with whom no privity with these movants or either of them is shown or alleged.

(b) That an alleged cause of action against these movants as heirs and distributees of the estate of Jeanette Fensky, deceased, is united and mingled with an alleged cause of action against one who acted as administrator of said estate, based upon his acts as such administrator, and with whom no privity with these movants or either of them is shown or alleged.

7. That it appears on the face of said complaint that plaintiffs' supposed cause of action against these defendants and each of them is barred by the provisions of Subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

8. That it appears upon the face of said complaint

that plaintiffs' supposed cause of action against these defendants and each of them is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

9. That it appears upon the face of said complaint that the causes of complaint are stale and that so long a time has [38] passed since the matters and things complained of took place that it would be contrary to equity and good conscience for this Court to take cognizance thereof or to enforce any further or other answer thereto.

10. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said complaint did not accrue if it accrued at all, to plaintiffs within five years before the bringing of this suit.

11. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said complaint did not accrue, if it accrued at all, to plaintiffs within four years before the bringing of this action.

12. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said complaint did not accrue if it accrued at all, to plaintiffs within three years before the bringing of this action.

13. That it appears on the face of said complaint that the same is uncertain in each of the following respects, to wit:

(a) That it cannot be ascertained therefrom whether the plaintiffs or either of them had, prior to the sale and transfer to Jeanette Fensky, of their

interests in the estate of Ferdinand Fensky, any actual knowledge of any of the alleged sales of real estate;

(b) That it cannot be ascertained therefrom whether the deeds described in Paragraph XI or any of them, were recorded, prior to the sale and transfer to Jeanette Fensky of the interests of the plaintiffs in the estate of Ferdinand Fensky, nor whether the alleged purchasers, or any of them were then in possession of the land sold.

(c) That it cannot be ascertained therefrom what, if any, part of the Kansas real estate had not been sold. [39]

(d) That it cannot be ascertained therefrom what was the value of the real estate or personal property in California, set apart to the widow as a homestead or as exempt property, if any.

(e) That it cannot be ascertained therefrom whether the California property of Ferdinand Fensky or any of it was community property, nor whether it was shown to be so in the inventory.

(f) That it cannot be ascertained therefrom what papers or records, filed in the various administration proceedings described in plaintiffs' complaint are alleged to have failed to disclose the truth, nor in what respects or particulars they so failed.

(g) That it cannot be ascertained therefrom what representations or statements were made in the inventories in said administration proceedings upon the various estates or in any of such inventories nor which of such representations or statements were believed by the plaintiffs, nor which, thereof, if any

were false, nor what were the facts, if any, showing them to be so.

14. That it appears on the face of said complaint that the same is unintelligible in each of the same respects in which it is hereinbefore alleged to be uncertain.

15. That it appears on the face of said complaint that the same is ambiguous in each of the same respects in which it is hereinbefore alleged to be uncertain.

WHEREFORE, and for divers other good reasons of objection appearing upon the face of said complaint, this plaintiff prays the judgment of this honorable court, whether he shall be compelled to make further or any answer to the said complaint, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

J. H. MERRIAM,

Solicitor for Defendants.

Eugene Wellke and Minnie S. Farnsworth. [40]

[Endorsed]: No. B-15. In the District Court of the United States, State of California, Southern Division. Louisa Pickens, et al., Plaintiffs, vs J. H. Merriam, et al., Defendants. Motion to Dismiss. Service of the Within Motion to Dismiss is hereby admitted this 26th day of August, 1914. D. R. Hite and Davis, Kemp & Post, Attorneys for Plaintiffs. J. H. Merriam, Union Savings Bank Bldg., Pasadena, California, Attorney for Defendants Eugene Wellke and Minnie S. Farnsworth. Filed Aug. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [41]

[**Motion of J. H. Merriam to Dismiss Bill of
Complaint.**]

No. B-15—IN EQUITY.

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA J.
SCHMIDT, AMANDA KATZUNG, MINNIE
S. FARNSWORTH, CORRINE LOVELAND
and DON FERGUSON,

Defendants.

Now comes the defendant, J. H. Merriam, and, on the records, pleadings and files in said cause moves the Court to dismiss the plaintiffs' complaint on the following grounds:

1. That it appears on the face of said complaint, by plaintiffs' own showing, that they are not entitled, nor is either of them entitled, to the relief prayed for by the complaint against this defendant, or to any relief arising from the facts alleged in said complaint.

2. That it appears on the face of said complaint that this court has no jurisdiction to hear and determine this suit.

3. That it appears on the face of said complaint that this court has no jurisdiction of the subject matter of this suit. [42]

4. That it appears on the face of said complaint that said complaint of the plaintiffs is wholly without equity.

5. That it appears on the face of said complaint that there is a misjoinder of parties defendant in that movant, J. H. Merriam, is improperly united as a defendant with the other parties named as defendants in this suit.

6. That it appears on the face of said complaint that there is a misjoinder of causes of action set forth in said complaint in this:

(a) That an alleged cause of action against this movant, based upon his acts as administrator of the estate of Jeanette Fensky, deceased, is united and mingled with an alleged cause of action against the persons to whom the estate of said Jeanette Fensky was distributed.

(b) That an alleged cause of action against this movant, based upon his acts as administrator of the estate of Jeanette Fensky, deceased, is united and mingled with alleged causes of action against persons who were neither heirs, distributees or creditors of said estate and with whom no privity with this movant is shown or alleged.

7. That it appears on the face of said complaint that plaintiffs' supposed cause of action against this defendant is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California.

8. That it appears on the face of said complaint that plaintiffs' supposed cause of action against this

defendant is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California.

9. That it appears on the face of the complaint that the causes of complaint are stale, and that so long a time has passed [43] since the matters and things complained of took place that it would be contrary to equity and good conscience for this Court to take cognizance thereof or to enforce any further or other answer thereto.

10. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said complaint did not accrue, if it accrued at all, to plaintiffs within five years before the bringing of this suit.

11. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said complaint did not accrue, if it accrued at all, to plaintiffs within four years before the bringing of this suit.

12. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said complaint did not accrue, if it accrued at all, to plaintiffs within three years before the bringing of this suit.

13. That it appears on the face of said complaint that the same is uncertain in each of the following respects, to wit:

(a) That it cannot be ascertained therefrom which, if any, of the papers or records in the administration proceedings in California upon the estate of Jeanette Fensky, deceased, are alleged to have failed to disclose the truth, nor in what respects, if at all,

they or any of them so failed.

(b) That it cannot be ascertained therefrom what statements, if any, were contained in the inventory returned in the administration proceedings in California, upon the estate of Jeanette Fensky, deceased, nor which, if any, of such statements were believed by the plaintiffs, nor which, if any, of such statements were false, nor what were the facts or circumstances showing them to be so. [44]

(c) That it cannot be ascertained therefrom what representations, if any, are alleged to have been made by this defendant to the plaintiffs, nor which such representations, if any, were believed by the plaintiffs thereof, if any, were false, nor what facts or circumstances showed them to be so.

14. That it appears on the face of said complaint that the same is unintelligible in the same respects in which it is hereinbefore alleged to be uncertain.

15. That it appears on the face of said complaint that the same is ambiguous in the same respects in which it is hereinbefore alleged to be uncertain.

WHEREFORE, and for divers other good causes of objection appearing on the face of said complaint, this defendant prays the judgment of this Honorable Court whether he shall be compelled to make further, or any, answer to the said complaint, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

WM. J. HUNSAKER,
E. W. BRITT,

Solicitors for Defendant J. H. Merriam.

[Endorsed]: Original. No. B-15—In Equity. In the United States District Court, Southern District of California, Southern Division. Louisa Pickens, et al., Complainants, vs. J. H. Merriam, et al., Defendants Motion to Dismiss. Service of the Within. Motion to Dismiss is hereby admitted this 26th day of August, 1914. D. R. Hite and Davis, Kemp & Post, Attorneys for complainants. Hunsaker & Britt, 1132-1143 Title Insurance Bldg., Fifth and Spring Streets, Los Angeles, Cal. Attorneys for deft. J. H. Merriam. Filed Aug. 27, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [45]

[Minutes of Court, March 1, 1915 — Order of Submission of Motion to Dismiss Bill of Complaint, etc.]

At a stated term, to wit, the January Term, A. D. 1915, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the Courtroom thereof, in the city of Los Angeles, on Monday, the first day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B-15—EQUITY.

LOUISA PICKENS et al.,

Complainants,

vs.

J. H. MERRIAM et al.,

Defendants.

This cause having come on at the hour of 3 o'clock, P. M., of this day pursuant to continuance, to be heard on the motion of defendant J. H. Merriam to strike out certain parts of the bill of complaint, and having also come on to be heard on the motion of said defendant Merriam to dismiss the bill of complaint; Charles A. Post, Esq., appearing as counsel for complainants; William J. Hunsaker, Esq., appearing as counsel for defendant Merriam; now, on motion of Wm. J. Hunsaker, Esq., of counsel for defendant Merriam and other defendants, and with the consent of Charles A. Post, Esq., of counsel for complainants, it is ordered that defendants Amanda Katzung, Corrine Loveland and Don Ferguson be, and they hereby are allowed ten (10) days after the ruling of the Court on defendant's motion to dismiss the bill of complaint within which to file their answer to said bill of complaint; and it is further ordered, [46] on motion of said William J. Hunsaker, Esq., of counsel for certain defendants, and with the consent of counsel for complainants, that the demurrers to the bill of complaint heretofore filed herein, and also the motions of defendant J. H. Merriam to strike out certain parts of said bill of complaint be stricken from the files herein; and thereupon said motion of defendant Merriam to dismiss the bill of complaint having been argued, in support thereof, by William J. Hunsaker, Esq., of counsel for said defendant and in opposition thereto by Charles A. Post, Esq., of counsel for complainants, and in support thereof in reply by William J. Hunsaker Esq., of counsel for said defendant and in

opposition thereto in reply by Charles A. Post, Esq., of counsel for complainants; it is ordered that this cause be, and the same hereby is submitted to the Court for its consideration and decision on said motion to dismiss the bill of complaint and the oral argument thereof, and also upon briefs to be served and filed as follows, to wit: On behalf of complainants within ten (10) days, and on behalf of defendants within ten (10) days thereafter. [47]

[Minutes of Court, March 1, 1915 — Order of Submission of Motion to Dismiss Bill of Complaint, etc.]

At a stated term, to wit, the January Term, A. D. 1915, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the Courtroom thereof, in the city of Los Angeles, on Monday, the first day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B-15—EQUITY.

LOUISA PICKENS et al.,

Complainants,

vs.

J. H. MERRIAM et al.,

Defendants.

This cause having come on at the hour of 3 o'clock, P. M. of this day, pursuant to continuance, to be

heard on the motion of defendants Eugene Wellke and Minnie S. Farnsworth to strike out certain parts of the bill of complaint, and also to be heard on the motion of said defendants to dismiss the bill of complaint; Charles A. Post, Esq., appearing as counsel for complainants; William J. Hunsaker, Esq., appearing as counsel for defendants Wellke and Farnsworth and other defendants; now, on motion of Wm. J. Hunsaker, Esq., of counsel for certain defendants, and with the consent of Charles A. Post., Esq., of counsel for complainants, it is ordered that defendants Amanda Katzung, Corrine Loveland and Don Ferguson be, and they hereby are allowed ten (10) days after the ruling of the Court on defendant's motion to [48] dismiss the bill of complaint within which to file their answer to said bill of complaint; and it is further ordered, on motion of said William J. Hunsaker, Esq. of counsel for certain defendants, and with the consent of said counsel for complainants, that the demurrers to the bill of complaint heretofore filed herein, and also the motion of defendants Eugene Wellke and Minnie S. Farnsworth to strike out certain parts of the bill of complaint be stricken from the files herein; and it is further ordered, on motion of William J. Hunsaker, Esq., of counsel for certain defendants, and with the consent of said counsel for complainants that the name of defendant Alma J. Schmidt be inserted in the motion of defendants Eugene Wellke and Minnie S. Farnsworth to dismiss the bill of complaint as one of the defendants making said motion, and that she be considered as joining

in said motion to dismiss; and thereupon said motion of defendants Eugene Wellke, Minnie S. Farnsworth and Anna J. Schmidt to dismiss the bill of complaint having been argued, in support thereof, by William J. Hunsaker, Esq., of counsel for said defendants, and in opposition thereto by Charles A. Post, Esq., of counsel for complainants and in support thereof in reply by William J. Hunsaker, Esq., of counsel for said defendants, and in opposition thereto in reply by Charles A. Post, Esq., of counsel for complainants; it is ordered that this cause be, and the same hereby is submitted to the court for its consideration and decision on said motion to dismiss the bill of complaint and the oral argument thereof, and also upon briefs to be served and filed as follows, to wit: On behalf of complainants within (10) days, and on behalf of defendants within ten (10) days thereafter. [49]

[Minutes of Court August 14, 1915—Order Granting Motion to Dismiss Bill of Complaint, etc.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Saturday, the fourteenth day of August, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B-15—EQUITY.

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM et als.,

Defendants.

This cause having heretofore been submitted to the Court for its consideration and decision on defendants' motion to dismiss said bill of complaint, and the Court having duly considered the same, and being fully advised in the premises, handed down its written opinion granting said motion to dismiss, said order of dismissal being made without prejudice. [49—a]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B-15—EQUITY.

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Memorandum Opinion.

In this case, although very careful attention has

been given to the matter submitted, and to the points advanced by the respective parties, because of the pressure of other matters here in court, the Court is unable to do more than indicate in the briefest manner its conclusions herein.

I am not at all sure that the challenge made as against complainants' bill, that it is barred by laches, is not sustainable. Even in the case of the fraud charged, it is clear that many of the things alleged to have been misrepresented or concealed must have been within the knowledge of complainants. They were sisters of the intestate; they must have had information as to when he married, whether his property was obtained previous thereto, and whether or not it was separate or community property. [50]

It is clear from allegations in the complaint that much of the valuable property in Topeka, Kansas, was a part of an addition in that city bearing the intestate's name; one of the complainants resided in that city and it surely must be true in spite of allegations seemingly pointing to the contrary, that she knew of the fact of property being owned there by her brother, and it is fair to assume that if such property constituting such "an addition" as is referred to had been sold as city or town lots under contract, that some or much of it had been improved by the vendees thereof, and it consequently must have come to her that such vendees or presumed occupants in possession, went into possession under some claim of title or contract of sale, and that, in consequence, *must* have known that the moneys derivable therefrom at the time of the death of the deceased, could not, un-

der the Kansas law as alleged in the bill, have descended by succession to the widow. In spite of all this information which it must be presumed complainants had, there was a delay from 1903, the date of death of the intestate until July, 1914, a period of almost eleven years, before suit was brought. During that time not only had the years run as just indicated, but conditions and circumstances had changed. The estate of complainants' brother had been entirely administered. Except what came to complainants as set forth in the bill, it had passed by distribution to the wife of the intestate, she in turn had deceased, and all of her property has been either by conveyance or distribution passed to other persons who are now made defendants in this proceeding.

[51]

Under these circumstances it is difficult for me to believe, first, that the complainants have acted with the diligence which was due from them under the circumstances, and that, their claim is not stale. (51 Fed. 487; 51 Fed. 493.)

Passing that question, however, I cannot bring myself to believe that the fraud alleged in the bill is of such an extrinsic and collateral character as that it will suffice to avoid the decrees of the Probate Courts of Kansas and California referred to in the bill. I confess to an inability to differentiate clearly in my own mind between some of the decisions both in the State and Federal Courts, as to what is and what is not extrinsic fraud, with respect to the validity of such a decree as is here sought to be overthrown. This case, however, seems to fall within

facts and reasoning of the following cases ;

U. S. v. Thropmoor, 98 U. S. 65.

Pico v. Cohn, 91 Cal. 129.

Hanley v. Hanley, 114 Cal. 690.

Langdon v. Blackburn, 109 Cal. 19.

Fealey v. Fealey, 104 Cal. 354.

Stead v. Curtis, 305 Fed. 439.

The facts alleged in Langdon v. Blackburn, *supra*, with respect to the character of the fraud perpetrated, and to things said and done which tended to prevent the plaintiff therein from pursuing such a course of inquiry as would have enabled her to have protected her rights if the fraud had not been perpetrated, in my judgment, are essentially paralleled by the facts alleged in the case at bar. Nothing is herein set forth which shows that the complainants were in any wise prevented from appearing in court and protecting their rights, or from making any investigation as to the true condition of affairs. [52]

It is true that they did assign all their interest in their brother's estate for the sum of \$1,000 each but it is difficult to believe and particularly so in view of the unverified allegations in the bill that if their brother's estate amounted to many thousands of dollars, both in Kansas and California as is alleged, that they should have been so lacking in knowledge as to the extent of it as to have conveyed all their rights therein for the meager sum of \$1,000 each. Be that as it may however, and assuming that the unverified bill states the exact facts of the case, nevertheless there is nothing therein from which it can be even inferred that complainants were at all pre-

vented from making the investigations which would **have resulted in a disclosure of all of their rights.**

After the making of the assignment by them, and its reception into and consideration by the Court, it was the duty of the Court to, and presumably it did, consider and determine all of the things which it would have had to determine had such assignment not been made, with the single exception, it was not required to determine the exact proportion of the estate, which, under the law, was distributable to the complainants. The amount, character and value of the estate belonging to the intestate, however, were determined by the Court, and were by it solemnly distributed, as according to the law, to defendant's predecessor in interest.

In this view of the case I cannot come to any conclusion other than that, the fraud charged was intrinsic as that term is used in the authorities. It was an imposition upon the Court, of course, but it was an imposition by false evidence. [53]

It is perhaps a matter of slight importance, but nevertheless I call it to the attention of counsel, that there are allegations with respect to the want of title of the defendants, that are rather inaptly made; for instance, it is said that "all of said deeds so made out by the said Jeanette Fensky were not delivered to the respective grantees named therein until after the death of said Jeanette Fensky." An allegation that "all of the deeds" were not delivered is in effect an allegation that some and perhaps all except one were delivered. Further, an allegation that such deeds were not delivered to the grantees is entirely con-

sistent with a delivery sufficient under the law to pass title to third persons in escrow.

The motion to dismiss is granted.

Though any amendment to the complaint would perhaps be futile, because of my conclusions as hereinabove set forth, the order of dismissal will be made *without prejudice*.

BLED SOE,
Judge.

August Fourteenth, 1915.

[Endorsed]: B-15—Eq. No. B-15—Eq. U. S. District Court, Southern District of California, Southern Division. Opinion and Order of Court. Filed Aug. 14, 1915. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy. [54]

No. B-15—IN EQUITY.

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Decree of Dismissal.

This cause came on to be heard at the January,

1915, term, on the motion of defendants to dismiss the complaint, and was argued by counsel and submitted for decision; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that plaintiff's complaint be dismissed without prejudice.

WHEREFORE it is now ORDERED, ADJUDGED AND DECREED that plaintiffs' complaint be, and the same is hereby, dismissed, without prejudice, with costs to be paid by the plaintiffs to defendants and to be taxed by the clerk.

Done in open court this 7th day of September, A. D. 1915.

BENJAMIN F. BLEDSOE,

Judge.

Decree entered and recorded Sept. 7, 1915.

WM. M. VAN DYKE,

Clerk.

By T. F. Green,

Deputy. [55]

[Endorsed]: Original. No. B-15—In Equity. In the United States District Court, Southern District of California, Southern Division, Louisa Pickens, et al., Complainants, vs. J. H. Merriam, et al., Defendants. Decree of Dismissal. Hunsaker & Britt, 1132-1143 Title Insurance Bldg., Fifth and Spring Streets, Los Angeles, Cal., Attorneys for Deft. Merriam. Filed Sep. 7, 1915. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. [56]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Assignment of Errors.

Now on this 10 day of January, 1916, came the complainants by their solicitors, Davis, Kemp & Post, and show that the order made and entered in the above cause on the 14th day of August, 1915, granting the motion of defendants to dismiss complainants' Bill of Complaint, and the decree entered in said cause on the 7th day of September, 1915, by which it was ordered, adjudged and decreed that the said Bill of Complaint be dismissed, and each of the same, are erroneous and unjust to complainants.

First. Because it does not appear on the face of said complaint by plaintiffs' own showing that they are not entitled nor that either of them are not entitled to the relief prayed for by the complaint against the said defendants, nor does it appear on the face of said complaint that said complainants are not entitled to any relief arising from the facts alleged in said complaint. [57]

Second. Because it does not appear on the face of said complaint that this Court has no jurisdiction to hear and determine this suit.

Third. Because it does not appear on the face of said complaint that this Court has no jurisdiction of the subject matter of this suit.

Fourth. Because it does not appear on the face of said complaint that said complaint is wholly without equity.

Fifth. Because it does not appear on the face of said complaint that there is a misjoinder of the parties defendant, in that the defendant J. H. Merriam is improperly united as a defendant with the other parties named as defendants in this suit.

Sixth. Because it does not appear on the face of said complaint that there is a misjoinder of causes of action set forth in said complaint in

(a) That the alleged cause of action against the said J. H. Merriam, based upon his acts as administrator of the estate of Jeanette Fensky, deceased, is united and mingled with the alleged causes of action against the persons to whom the estate of said Jeanette Fensky was distributed.

(b) That the alleged cause of action against the said J. H. Merriam, based upon his acts as administrator of the estate of Jeanette Fensky, deceased, is united and mingled with the alleged causes of action against persons that were either heirs, distributees or creditors of said estate, or with persons who were heirs or distributees of the said estate of Jeanette Fensky, and with whom no privity with the said J. H. Merriam is shown or alleged. [58]

Seventh. Because it does not appear on the face of said complaint that plaintiffs' cause of action against defendants, or any of them, is barred by the provision of Subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

Eighth. Because it does not appear on the face of said complainant that plaintiffs' cause of action against defendants, or any of them, is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

Ninth. Because it does not appear on the face of the complaint that the causes of complaint are stale, or that so long a time has passed since the matters and things complained of took place that it would be contrary to equity or good conscience, or either, for this Court to take cognizance thereof or to enforce any further or other answer thereto.

Tenth. Because it does not appear on the face of said complaint, or from the allegations therein, that the right of action set up in said complaint did not accrue to plaintiffs within five years before the bringing of this suit.

Eleventh. Because it does not appear on the face of said complaint, or from the allegations therein, that the right of action set up in said complaint did not accrue to plaintiffs within four years before the bringing of this suit.

Twelfth. Because it does not appear on the face of said complaint, or from the allegations therein, that the right of action set up in said complaint did not accrue to plaintiffs within three years before the bringing of this suit.

Thirteenth. Because it does not appear on the face of said complaint that the same is uncertain in each of the following respects, or any of them to wit:
[59]

(a) That it cannot be ascertained therefrom which, *of* any, of the papers or records in the administration proceedings in California upon the estate of Jeanette Fensky, deceased, are alleged to have failed to disclose the truth; nor in what respects, if at all, they or any of them so failed.

(b) That it cannot be ascertained therefrom what representations or statements if any, were contained in the inventory returned in the administration proceedings in California upon the estate of Jeanette Fensky, deceased; nor which, if any, of said representatives or statements were believed by plaintiffs; nor which, if any, of such representations or statements were false; nor what were the facts or circumstances showing them to be so.

(c) That it cannot be ascertained therefrom what representations if any, are alleged to have been made by defendants to plaintiffs, nor which of said representations, if any, were believed by plaintiffs; and which thereof, if any, were false, nor what facts or circumstances, if any, showed them to be so.

(c) That it cannot be ascertained from said complaint whether the plaintiffs, or either of them had, prior to the sale and transfer to Jeanette Fensky of their interest in the estate of Ferdinand Fensky, any actual knowledge of any of the alleged sales of real estate. That it cannot be ascertained therefrom whether the deeds described in paragraph XI, or any

of them, were recorded prior to the sale and transfer to Jeanette Fensky of the interests of the plaintiffs in the estate of Ferdinand Fensky, or whether the alleged purchasers, or any of them, were then in possession of the land sold. That it cannot be ascertained therefrom what, if any, part of the Kansas real estate had not been sold. That it cannot be ascertained therefrom [60] what was the value of the real estate or personal property in California set apart to the widow as a homestead or exempt property, if any. That it cannot be ascertained therefrom whether the California property of Ferdinand Fensky, or any of it, was community property; nor whether it was shown to be so in the inventory.

Fourteenth. Because it does not appear on the face of said complaint that the same is unintelligible in any respects whatsoever.

Fifteenth. Because it does not appear on the face of said complaint that the same is ambiguous in any respect whatsoever.

Sixteenth. Because M. T. Campbell is not joined as a party defendant in said action.

Seventeenth. Because the said order and decree, and each of them, are against law and equity.

WHEREFORE, complainants pray that the said order and decree be reversed and the defendants herein, and each of them be required to answer said Bill of Complaint within the time provided by law.

DAVIS, KEMP & POST,
Attorneys for Complainants.

[Endorsed]: Original. No. B-15. In the United States District Court, in and for the Southern Dis-

trict of California, Southern Division. Louisa Pickens, et al., Plaintiffs, vs. J. H. Merriam, et al., Defendants. Assignment of Errors. Filed Jan. 10, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Davis, Kemp & Post, Suite 812 Marsh-Strong Bldg. Tel. Home A-5037, Main 1953, Los Angeles, Cal., Attorneys for Plaintiffs. [61]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Petition for Appeal.

To the Honorable BENJAMIN F. BLEDSOE, Judge
of the District Court:

The above-named complainants, feeling themselves aggrieved by the order dismissing the said complaint entered by the said District Court on the 14th day of August, 1915, and by the decree made and entered by said Court in said cause on the 7th day of September, 1915, whereby it is ordered, adjudged and decreed that the said Bill of Complaint be dismissed, do hereby appeal from said order and

decree, and each of them, to the Circuit Court of Appeals for the Ninth Circuit, for the reasons cited in the Assignment of Errors, which is filed herewith, and said plaintiffs pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, Ninth Circuit, sitting at San Francisco, [62] California.

And your petitioners further pray that the proper order touching the security to be required of them to bring their appeal be made.

DAVIS, KEMP & POST,

Attorneys for Complainants and Petitioners.

[Order Allowing Appeal and Fixing Amount of Bond.]

It is hereby ordered that the foregoing petition be granted and the appeal allowed upon the complainants and plaintiffs in error giving bond in the sum of \$250 to the effect that if the said complainants and plaintiffs in error shall prosecute said writ of error with effect and answer all damages and costs if they fail to make their appeal good, then the said obligation to be void, otherwise to remain in full force and effect; the said bond to be approved by the clerk of this court.

Dated this 10th day of January, 1916.

BLEDSON,

Judge.

[Endorsed]: Original. No. B-15. In Equity. In the United States District Court, in and for the Southern District of California, Southern Division. Louisa Pickens, et al., Plaintiffs, vs. J. H. Merriam et al., Defendants. Petition for Appeal and Order Allowing. Filed Jan. 10 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Davis, Kemp & Post, Suite 812 Marsh-Strong Bldg. Tel. Home A-5037, Main 1953, Los Angeles, Cal., Attorneys for Plaintiffs. [63]

[Power of Attorney of Globe Indemnity Company.]

POWER OF ATTORNEY.

GLOBE INDEMNITY COMPANY.

Home Office: New York, N. Y.

KNOW ALL MEN BY THESE PRESENTS: That the Globe Indemnity Company, by A. Duncan Reid, its Vice-president, in pursuance of authority granted by Section 1, Article IX, of the By-laws of said Company, a copy of which section is hereto attached, does hereby nominate, constitute and appoint L. S. Ferry, T. F. Doran, J. S. Dean, W. C. Stephenson, W. W. Webb and F. E. Whitney, all of the City of Topeka, State of Kansas, its true and lawful agents and attorneys in fact, to make, execute, seal and deliver for and on its behalf, and as its act and deed any and all bonds and undertakings not exceeding One Hundred Thousand (\$100,000) Dollars each in its business of guaranteeing the fidelity of persons holding places of public or private trust and in the performance of contracts other than insurance policies, and executing

or guaranteeing bonds or other undertakings not exceeding One Hundred Thousand (\$100,000) Dollars each required or permitted in all actions or proceedings or by law required or permitted. All such bonds or undertakings to be signed for the Company by either L. S. Ferry, T. F. Doran or J. S. Dean, and attested and the seal of the Company attached thereto by either W. C. Stephenson, W. W. Webb or F. E. Whitney, as occasion may require. AND

Bonds and undertakings of Suretyship in penalties not exceeding Ten Thousand (\$10,000) Dollars each for Executors, Administrators, Receivers, Assignees, Commissioners for the Sale of Property, Guardians, Trustees, Conservators or Committees of [64] Incompetents required to be given by any Statute, Order or Decree of any Court of the State of Kansas or in the United States District Court for said State, and for Trustees and Receivers in Bankruptcy Proceedings under the Bankrupt Act of the United States. All such bonds or undertakings to be signed and the Seal of the Company attached thereto by either one of W. C. Stephenson, W. W. Webb, or F. E. Whitney.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the company at its office in New York City, State of New York, in their own proper persons.

IN WITNESS WHEREOF, the said A. Duncan Reid, Vice-president has hereunto subscribed his name and affixed the Corporate Seal of the said Globe Indemnity Company this 3d day of December, 1912.

[Seal]

A. DUNCAN REID,

Vice-president.

State of New York,
County of New York,—ss.

On this 3d day of December, A. D. 1912, before the subscriber, a notary public of the State of New York, in and for the county of New York, duly commissioned and qualified came A. Duncan Reid, Vice-president of the Globe Indemnity Company, to me personally known to be the individual and officer described in, and who executed, the preceding instrument, and he acknowledged the execution of the same, and being by me duly sworn, deposeth [65] and saith, that he is the said officer of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and the said corporate seal and his signature as such officer was duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at the city of New York, the day and year first above written.

T. A. W. IRELAND,

Notary Public, Richmond County,

Certificate filed in New York County, No. 4.

Commission expires March 30, 1914.

Extract from By-laws of the Globe Indemnity Company, adopted by the directors of said company on May 29th, 1912:

“Article IX, Section 1.—The President, any Vice-president or the General Manager and Secretary, shall have power and authority to appoint resident Vice-presidents, resident Assistant Secretaries and Attorneys in fact, and to authorize them to execute on behalf of the Company and attach the Seal of the Company thereto, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof.”

I, A. Duncan Reid, Vice-president of the Globe Indemnity Company, hereby certify that the foregoing is a true copy of Section 1, Article IX, of the By-laws of said company, and is still in force.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name as vice-president and affixed the corporate seal of the Globe Indemnity Company, this 3d day of December, A. D. 1912.

[Seal]

A. DUNCAN REID,
Vice-president. [66]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Louisa Pickens and Johanna Schutt, as
principals, and Globe Indemnity Company of New
York, as surety, acknowledge ourselves to be jointly
indebted to J. H. Merriam, Eugene Wellke, Alma J.
Schmidt, Amanda Katzung, Minnie S. Farnsworth,
Corrine Loveland and Don Ferguson, appellees in
the above cause in the sum of Two Hundred and
Fifty Dollars (\$250), conditioned that

WHEREAS, on the 14th day of August, 1915, in
the District Court of the United States, for the
Southern District of California, Southern Division,
in a suit pending in that court wherein Louisa Pick-
ens and Johanna Schutt were plaintiffs and J. H.
Merriam, Eugene Wellke, Alma J. Schmidt, Amanda
Katzung, Minnie S. Farnsworth, Corrine Loveland
and Don Ferguson were defendants, numbered on
the equity docket as B-15, an order was made

granting defendants' motion to dismiss the complaint of [67] plaintiffs, and on the 7th day of September, 1915, a decree was rendered against the said Louisa Pickens and Johanna Schutt, and the said Louisa Pickens and Johanna Schutt having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said order and decree.

NOW, THEREFORE, if the said complainants, Louisa Pickens and Johanna Schutt, shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

LOUISA PICKENS,

Principals.

GLOBE INDEMNITY COMPANY.

By T. F. DORAN,

Attorney in Fact,

Surety.

[Seal]

Attest: F. E. WHITNEY,

Attorney in Fact.

Approved this 5th day of February, 1916.

BLEDSON,

Judge.

State of Kansas,

County of Shawnee,—ss.

On this first day of February, 1916, before me personally appeared the within named T. F. Doran and F. E. Whitney, both attorneys in fact for the Globe

Indemnity Company of New York, to me known and known to me to be the individuals described in and who executed the foregoing instrument as to [68] Surety, and acknowledged to me that they executed the same.

[Seal]

R. A. FERLET,
Notary Public.

My commission expires Feb. 20, 1916.

[Endorsed]: No. B-15 — In Equity. In the United States District Court, in and for the Southern District of California, Southern Division. Louisa Pickens et al., Plaintiffs, vs. J. H. Merriam et al., Defendants. Bond on Appeal. Filed Feb. 5. 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Davis, Kemp & Post, Suite 812 Marsh-Strong Bldg. Tel. Home A-5037 Main 1953, Los Angeles, Cal., Attorneys for Plaintiffs. [69]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern
District of California, Southern Division.*

Clerk's Office.

No. B-15—IN EQUITY.

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Praeipe [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please issue Transcript of record on appeal in the above-entitled action containing the following documents:

Bill of complaint.

Subpoena.

Motion to dismiss of defendants Eugene Wellke,
Minnie S. Farnsworth.

Motion to dismiss of defendant J. H. Merriam.

Minute orders of March 1st, 1915.

Minute orders of August 14th. 1915, granting motion to dismiss.

Memorandum of opinion of the Court.

Decree of dismissal. [70]

DAVIS, KEMP & POST,

Attys. for Complainants and Appellants.

Received a copy of the within this 21st day of January, 1916.

J. H. MERRIAM,

HUNSAKER & BRITT,

Attys. for Defts., for Whom We have Appeared.

[Endorsed]: Original. No. B-15—In Equity. U. S. District Court, Southern District of California, Southern Division. Louisa Pickens et al., Complainants, vs. J. H. Merriam et al., Defendants. Praeipe for Transcript. Filed Jan. 21, 1916. Wm. M. Van Dyke, Clerk. R. S. Zimmerman, Deputy Clerk. [71]

[Certificate of Clerk U. S. District Court to
Transcript of Record.]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B-15—EQUITY.

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

I. Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing seventy-two (72) typewritten pages, numbered from 1 to 71, inclusive, and including page number 49A, to be a full, true and correct copy of the Bill of Complaint, Subpoena, Motion to Dismiss, of defendants Eugene Wellke and Minnie S. Farnsworth, Motion to Dismiss, of defendant J. H. Merriam, Minute Orders of March 1st, 1915, and of August 14th, 1915, Memorandum Opinion, Decree of Dismissal, Assignment of Errors, Petition for Appeal and Order allowing same, Bond on Appeal, and Praecipe for Preparation of Transcript in the above and therein-entitled cause and that the same together

constitute the record upon the appeal of Louisa Pickens and Johanna Schutt, herein, in accordance with the Praeceptum for Preparation of Transcript filed in my office on behalf of the appellants by their solicitors of record. [72]

I do further certify that the cost of the foregoing Transcript Upon Appeal is \$38 20/100, the amount whereof has been paid me by Louisa Pickens and Johanna Schutt, the appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 5th day of April, in the year of our Lord, one thousand nine hundred and sixteen, and of our Independence, the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,
Deputy Clerk.

[Ten-cent Internal Revenue Stamp. Canceled
4/5/16. L. S. C.] [73]

[Endorsd]: No. 2783. United States Circuit Court of Appeals for the Ninth Circuit. Louisa Pickens and Johanna Schutt, Appellants, vs. J. H. Merriam, Eugene Wellke, Alma J. Schmidt, Amanda Katzung, Minnie S. Farnsworth, Corrine Loveland, and Don Ferguson, Appellees. Transcript of Rec-

ord. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed April 24, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

**[Order Under Rule 16 Enlarging Time to May 1,
1916, to File Record and Docket Cause.]**

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

LOUISA PICKENS and JOHANNA SCHUTT,
Appellants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Appellees.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellants to docket said cause and file the record thereof, with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the first day of May, 1916.

Dated at Los Angeles, California, March 3d, 1916.

BLEDSON,
Judge.

[Endorsed]: No. 2783. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to May 1, 1916, to File Record Thereof and to Docket Case. Filed Mar. 3, 1916. F. D. Monckton, Clerk. Refiled Apr. 24, 1916. F. D. Monckton, Clerk.